

MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT  
SENTENCE BY A PERSON IN FEDERAL CUSTODY

**BECKMANN**

<b>United States District Court</b>		District SOUTHERN DISTRICT OF OHIO	
Name of Movant <b>LARRY KAPP</b>		Prisoner No. <b>03535-061</b>	Case No. <b>CR-1-02-0023-001</b>
Place of Confinement <b>FCI TUCSON, 8901 S. WILMOT ROAD, TUCSON, AZ 85706-9700</b>			
UNITED STATES OF AMERICA		LARRY KAPP (name under which convicted)	
<b>MOTION</b>			
1. Name and location of court which entered the judgment of conviction under attack <u>UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, 100 E. FIFTH STREET, CINCINNATI, OH 45202</u>			
2. Date of judgment of conviction <u>OCTOBER 24, 2002</u>			
3. Length of sentence <u>96 MONTHS</u>			
4. Nature of offense involved (all counts) <u>CONSPIRACY TO DISTRIBUTE IN EXCESS OF ONE-THOUSAND KILOGRAMS OF MARIJUANA</u>			
5. What was your plea? (Check one)			
(a) Not guilty <input type="checkbox"/>			
(b) Guilty <input checked="" type="checkbox"/>			
(c) Nolo contendere <input type="checkbox"/>			
If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:			
6. If you pleaded not guilty, what kind of trial did you have? (Check one)			
(a) Jury <input type="checkbox"/>			
(b) Judge only <input type="checkbox"/>			
7. Did you testify at the trial? Yes <input type="checkbox"/> No <input type="checkbox"/>			
8. Did you appeal from the judgment of conviction? Yes <input type="checkbox"/> No <input type="checkbox"/>			

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U.S. DISTRICT COURT  
SOUTHERN DIST OHIO  
WEST DIV CINCINNATI

9. If you did appeal, answer the following:

- (a) Name of court United States Court of Appeals for the Sixth Circuit  
(b) Result Denied  
(c) Date of result September 9, 2004

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?

Yes ☐ No ☒

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court \_\_\_\_\_

(2) Nature of proceeding \_\_\_\_\_  
\_\_\_\_\_

(3) Grounds raised \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result \_\_\_\_\_

(6) Date of result \_\_\_\_\_

(b) As to any second petition, application or motion give the same information:

(1) Name of court \_\_\_\_\_

(2) Nature of proceeding \_\_\_\_\_  
\_\_\_\_\_

(3) Grounds raised \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(4) Did you receive an evidentiary hearing on your petition, application or motion?  
Yes ☐ No ☐

(5) Result \_\_\_\_\_

(6) Date of result \_\_\_\_\_

(c) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☐ No ☐

(2) Second petition, etc. Yes ☐ No ☐

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

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12. State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: If you fail to set forth all ground in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.

- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. Ground one: Ineffective Assistance of Counsel - Sentencing. My attorney's erroneous legal advice resulted in my receiving an increased sentence.

Supporting FACTS (state *briefly* without citing cases or law) My attorney, Bertram Polis, told me in order to be eligible for the federal Bureau of Prisons residential drug treatment program—which can earn you a year off your sentence—I would have to be able to prove I had a drug problem. Polis told me the way to prove I had a drug problem was to provide positive urinalysis tests prior to my sentencing. After providing several dirty UAs, Polis told me I was a "slam dunk" for the BOP drug program. However, at sentencing I actually received an upward departure for the dirty UAs. And, I am not even eligible for the BOP residential drug treatment program due to my past record which, as Polis was aware, contained a strong-arm robbery charge. Polis's erroneous and unethical advice resulted in my sentence being increased by 36 months.

B. Ground two: \_\_\_\_\_

Supporting FACTS (state *briefly* without citing cases or law): \_\_\_\_\_

C. Ground three: \_\_\_\_\_

Supporting FACTS (state *briefly* without citing cases or law): \_\_\_\_\_

D. Ground four: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Supporting FACTS (state *briefly* without citing cases or law): \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them: A claim of Ineffective Assistance of Counsel is properly presented in in 28 USC § 2255 petition.
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?  
Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Bertram Polis, 338 N. Granada, Tucson, AZ 85701

\_\_\_\_\_

(b) At arraignment and plea Bertram Polis, 338 N. Granada, Tucson, AZ 85701

\_\_\_\_\_

(c) At trial (Plea Agreement)

\_\_\_\_\_

(d) At sentencing Bertram Polis, 338 N. Granada, Tucson, AZ 85701

\_\_\_\_\_

(e) On appeal Hal Arenstein, 114 E. Eighth Street, Cincinnati, OH 45202

(f) In any post-conviction proceeding \_\_\_\_\_

(g) On appeal from any adverse ruling in a post-conviction proceeding \_\_\_\_\_

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future: \_\_\_\_\_

(b) Give date and length of the above sentence: \_\_\_\_\_

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☐

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

\_\_\_\_\_  
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

August 8, 2005

(date)

Larry Kapp  
Signature of Movant